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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Charles Belcher, et al.,

10 Plaintiffs,

11 v.

12 Mark R Tasset, et al.,

13 Defendants.
14

No. CV-24-01067-PHX-DLR

Consolidated with:

Case No. CV-24-01083-PHX-DLR

ORDER

15
16 Before the Court are Defendant Banner University Medical Center's ("Banner")
17 Motion to Compel Plaintiff's Preliminary Expert Affidavit (Doc. 137) and Notice of Non-
18 opposition to Motion to Compel Plaintiff's Preliminary Expert Affidavit (Doc. 138). For
19 the following reasons, the Court grants the motion.

20 **I. Background**

21 This is a medical negligence action stemming from care that Plaintiff Charles
22 Belcher received at Banner University Medical Center in May 2022. Plaintiffs' second
23 amended complaint ("SAC") contains four claims for relief: medical negligence, medical
24 battery, loss of consortium and companionship, and medical gaslighting. (Doc. 45 ¶¶ 31-
25 44.) In relevant part, the SAC alleges that on May 15, 2022, Charles was admitted to Banner
26 University Medical Center and that Banner performed a venoarterial extracorporeal
27 membrane oxygenation ("VA ECMO") without Charles's consent, resulting in permanent
28 injuries. (*Id.* ¶¶ 4, 6, 31-36.)

1 On August 5, 2025, the parties filed a joint statement of discovery dispute. (Doc.
2 132.) Banner asserted that Plaintiffs must disclose an expert witness for the medical
3 negligence claim and sought leave to file a motion to compel such an affidavit. (Doc. 132
4 at 2-3.) Plaintiffs contended that an expert witness is not necessary for that claim. (Doc.
5 132 at 5.) The Court held a discovery hearing on August 7, 2025, after which it directed
6 Banner to file a motion to compel by August 18, 2025, with a response due from Plaintiffs
7 by August 29, 2025. (Doc. 134.) Banner timely filed its motion to compel (Doc. 137) but
8 Plaintiffs did not file a response (*see* Doc. 138).

9 **II. Analysis**

10 As a preliminary matter, because Plaintiffs did not file a response brief opposing the
11 motion, Local Rule of Civil Procedure 7.2(i) allows the Court to treat their non-
12 responsiveness as a consent to the granting of the motion. Nonetheless, the Court chooses
13 to also address the merits.

14 Plaintiffs construe, and Banner understands, their medical negligence claim to be
15 based on a theory of lack of informed consent. A.R.S. § 12-2603 governs medical
16 malpractice claims, including those based on a lack of informed consent. *Gorney v.*
17 *Meaney*, 150 P.3d 799, 803 (Ariz. Ct. App. 2007).

18 Under § 12-2603(A), a plaintiff must certify in a written statement at the outset of
19 the case “whether or not expert opinion testimony is necessary to prove the health care
20 professional’s standard of care or liability for the claim.” If the plaintiff certifies that expert
21 testimony is necessary, he must “serve a preliminary expert opinion affidavit” that
22 addresses the expert’s qualifications, summarizes the factual basis for the claim, explains
23 why the health care professional’s conduct constituted “a violation of the applicable
24 standard of care,” and explains why the health care professional’s conduct “caused or
25 contributed to the damages or other relief sought by the claimant.” § 12-2603(B). But if
26 the plaintiff disagrees that expert testimony is necessary, the opposing party move for “an
27 order requiring the claimant . . . to obtain and serve a preliminary expert opinion affidavit.”
28 § 12-2603(D). In that circumstance, the court must determine whether a preliminary expert

1 affidavit is required. § 12-2603(E).

2 Here, Plaintiffs did not certify a written statement pursuant to § 12-2603(A) or serve
3 a preliminary expert opinion affidavit pursuant to § 12-2603(B). Banner has filed a motion
4 to compel Plaintiffs to provide a preliminary expert affidavit under § 12-2603(D) and thus,
5 the Court must decide whether such an affidavit is necessary in this case.

6 The Arizona Supreme Court recently confirmed that § 12-2603 requires expert
7 testimony in lack of informed consent cases. *Francisco v. Affiliated Urologists Ltd.*, 553
8 P.3d 867, 873 (Ariz. 2024). Expert testimony is required both to establish the standard of
9 care and causation. “Arizona courts have long held that the standard of care normally must
10 be established by expert medical testimony.” *Seisinger v. Siebel*, 203 P.3d 483, 492 (Ariz.
11 2009). Similarly, “expert medical testimony is normally required to establish proximate
12 cause.” *Ryan v. San Francisco Peaks Trucking Co. Inc.*, 262 P.3d 863, 870 (Ariz. Ct. App.
13 2011) (citation omitted).

14 The only exceptions to § 12-2603’s requirement for expert testimony is where “the
15 negligence is so grossly apparent that a layman would have no difficulty in recognizing it,”
16 *Francisco*, 553 P.3d at 873 (quotation omitted), or where the “causal relationship is readily
17 apparent to the trier of fact,” *Ryan*, 262 P.3d at 870 (citation omitted). Plaintiffs’ medical
18 negligence claim does not fall within either exception.

19 Plaintiffs allege that Banner breached the standard of care by performing the VA
20 ECMO without consent. (Doc. 45 ¶ 31.) Although the facts are disputed at this point, the
21 negligence is not so grossly apparent that an expert is not required to establish the standard
22 of care. Banner had to evaluate the risks and benefits of performing the VA ECMO under
23 the circumstances and the informed consent required should “be established by expert
24 testimony in accordance with the applicable standard of medical care.” *Francisco*, 553 P.3d
25 at 874 (quotation omitted). Plaintiffs need an expert to establish the standard of care.

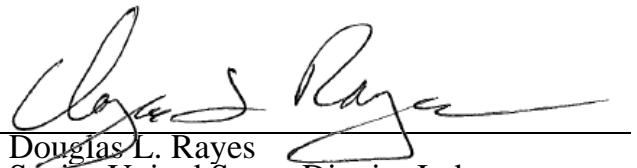
26 Plaintiffs also allege that Banner’s breach caused various harms. (Doc. 45 ¶¶ 33-
27 36.) The causal relationship between the alleged lack of informed consent and the alleged
28 harms is not so readily apparent that the requirement for an expert is eliminated.

1 “[P]laintiffs alleging lack of informed consent must show two types of causation: 1)
2 adequate disclosure would have caused the plaintiff to decline the treatment, and 2) the
3 treatment proximately caused injury to the plaintiff.” *Gorney*, 150 P.3d at 805 (citation
4 omitted). Plaintiffs here do not need an expert for the first type of causation, as they could
5 testify to this matter themselves. *See id.* But Plaintiffs do need an expert to establish that
6 the VA ECMO proximately caused the alleged injuries rather than, for example, “the
7 progression of a pre-existing condition or . . . some other cause, such as natural aging or a
8 subsequent injury.” *Id.* at 805.

9 Thus, the Court will order Plaintiffs to serve and file a preliminary expert affidavit
10 to support their claim of medical negligence against Banner. The affidavit must be filed
11 and served by no later than October 29, 2025. If Plaintiffs fail to comply, the Court will
12 dismiss the medical negligence claim. *See* § 12-2603(F).

13 **IT IS ORDERED** that Banner’s Motion to Compel Plaintiff’s Preliminary Expert
14 Affidavit (Doc. 137) is **GRANTED**. By no later than October 29, 2025, Plaintiffs must file
15 and serve a preliminary expert affidavit to support their medical negligence claim against
16 Banner.

17 Dated this 9th day of September, 2025.

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22 Douglas L. Rayes
23 Senior United States District Judge
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